Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

DAVID R. TINKLE,

Petitioner,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Age Discrimination in Employment Act 29 U.S.C. § 623(d) expressly prohibits retaliation in employment resulting from an individual opposing any practice made unlawful by the Act because that individual ". . . testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." The Petitioner, David Tinkle, testified and participated in a lawsuit brought by a co-worker against the Respondent/Employer. First, Tinkle rejected the request of the Respondent/Employer to confer with its attorney regarding the co-worker's lawsuit. Second, Tinkle later testified and provided direct evidence of age discrimination against the Respondent/Employer. Within a month after his initial participation, his supervisor began to subject him to a sundry of adverse employment actions, the last of which was abusive and culminated in his termination.

The questions presented are whether:

1. Whether under the "tangible action" analysis of *Ellerth*, the action taken by Tinkle's supervisor suffices for the "adverse employment action" prong in a retaliation claim; and,

2. In following the principles directed in *Reeves*, whether Tinkle's evidence was sufficient to survive judgment as a matter of law by establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802 (1973); and second, by the production of evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false; and,

3. Whether the lower court's erroneous application of the incorrect legal standard influenced the ultimate conclusion that Tinkled failed to prove an "adverse employment action" occurred.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices v

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 2

Reason for Granting the Writ 8

I. The Decisions Below Misapplies The Evidentiary Burdens Of Plaintiffs Who Attempt To Prove Intentional Discrimination Through Indirect Evidence 15

II. The Misapplication Of *Sanchez* Insulates An Entire Category From Review 20

III. The Courts' Refusal To Consider Favorable Inferences Treats Discrimination Differently From Other Ultimate Questions Of Fact ... 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Burlington Industries v. Ellerth, 524 U.S. 742, 118 S. Ct. 2268 (1998) ..... *passim*

Crady v. Liberty Nat. Bank & Trust Co. of Ind., 993 F.2d 132 (CA7 1993) 15, 16, 22

Durham Life Ins. Co. v. Evans, 166 F.3d 139 (3d Cir. 1999) 18, 19

Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998) 8, 18, 19, 22

Harris v. Fork Lift Systems, Inc., 510 U.S. 17 (1993) 8, 9, 13, 14, 16

McDonnell Douglas Corp. v. Greene, 411 U.S. 792 (1973) ..... i, 17

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) ..... i, 8, 9, 10, 11, 15, 16

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 8, 11, 13, 15, 17, 19, 20, 22

Riffel v. OG&E, No 97-6304 (10th Cir. 1997), D.C. No. CIV-96-1179-A 3, 4, 12, 13

Sanchez v. Denver Public Schools, 164 F.3d 527 (10th Cir. 1998) 15, 16, 20

Cited Authorities

	Page
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)	15
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	11
Statutes:	
28 U.S.C. § 1254(1)	1
29 U.S.C. § 623(d)	i, 1
Rule:	
Federal Rule of Civil Procedure 56	17
Other Authority:	
Black's Law Dictionary, Rvsd. 4th Ed.	15

TABLE OF APPENDICES

Page

Appendix A — Order And Judgment Of The United States Court Of Appeals For The Tenth Circuit Dated And Filed June 29, 2001 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Oklahoma Dated And Filed July 17, 2000 ..... 6a

Petitioner respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Magistrate Judge Gary M. Purcell) granting respondent's motion for summary judgment (Appendix (Pet. App. "B")) is found at Pet. App. "B" at p. 6a and is not published. The court of appeals' Order and Judgment (per Ebel, Porfilio and Kelly) affirming the grant of summary judgment (Pet. App. "A") is found at Pet. App. "A" at 1a and is not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on June 29, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The provisions of 29 U.S.C. § 623(d) relevant to this petition provide:

> (d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation
>
> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such

> individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

STATEMENT OF THE CASE

The Petitioner, David R. Tinkle (hereinafter referred to as "Tinkle" or "Plaintiff") was employed by Oklahoma Gas and Electric (hereinafter "OG&E" or "Employer") for twenty (20) years at the time of his termination. He was a witness against OG&E in an age discrimination law suit brought by a fellow co-worker. After he participated in the "protected activity" lawsuit, immediately thereafter he experienced a battery of adverse employment actions. His normal, daily duties were driving a heavy hauling truck. Over the years he suffered numerous job related back and neck injuries — the last, a re-aggravation of a neck injury, occurred in August, 1997, when he was forced to drive a 75 Ton Road Crane 80 miles.[1] The truck that he was assigned to operate was not equipped with "air-ride-suspension" and thereby presented a rough ride. Whereas, the trucks equipped with "air-ride-suspension" presented a relatively smooth ride. OG&E had in its inventory "air-ride-suspension" trucks which Tinkle requested to be assigned and he was denied. Instead of assigning him to a truck equipped with "air-ride-suspension", OG&E intentionally subjected him to physical harm and reprisal action by ordering him to drive a 75 Ton Road Crane approximately 80 miles. The District Court disregarded evidence in support of Tinkle's claim of retaliation (evidence disregarded

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1. In 20 years of employment, he had driven this crane only one (1) other time.

that appear on the face of the record will hereinafter be referred to as "Disreg'd"). Both lower courts failed to apply proper "standards" in ruling on Summary Judgment. A summary of some of the events leading to the filing of this writ of certiorari are as follows:

1. Shortly before undergoing neck surgery in March 1997, Petitioner, David R. Tinkle (hereinafter "Tinkle") had been scheduled for deposition as a witness for Don Riffel in *Riffel v. OG&E*, No 97-6304 (10th Cir. 1997), D.C. No. CIV-96-1179-A, Western District of Oklahoma. However, due to Tinkle's health, (a neck injury) the deposition was continued until June 6, 1997. Pet. App. "B" at 13a Prior to his neck surgery, Tinkle received a call from OG&E's attorney who requested that he meet with her to discuss the Riffel case, and Tinkle responded by stating: "I am not interested", and he hung up the phone. (Disreg'd).

2. Tinkle returned to duty following his neck surgery on April 28, 1997. Because of his surgery, he requested that he be reassigned to drive a truck equipped with "air-ride-suspension", which would have minimized the bumpy, rough ride that is peculiar to the standard truck to which he was assigned. Notwithstanding the availability of the requested vehicle, John Singleton, Tinkle's supervisor, denied his request. The record indicates that after he refused to meet with OG&E's attorney regarding the *Riffel* age discrimination case, he noticed a change in Singleton's attitude toward him. Pet. App. "B" at 14a, 15a, 31a, 32a.

3. Tinkle testified via deposition on June 6, 1997, in opposition to OG&E in an age discrimination case, *Riffel, Id.* Riffel maintained that John Singleton, his supervisor, was the alleged discriminating official and that he was terminated on the basis of age.[2] Tinkle testified that Riffel had often been referred to by "management" as "the old man" and specifically had been referred to as "the old man" by John Singleton. Tinkle testified that a few days after Singleton fired Riffel, he heard Singleton, at a company meeting say, referring to Riffel, "I'm not going to back that old man." Tinkle also indicated that, on that same occasion, Singleton said: "if it had been anybody else, I would have gone to bat for him. You know how old men are, they are — they aren't going to change." The circuit court, in reversing the decision of the district court in *Riffel*, found that Tinkle's testimony that Singleton indicated he would have "gone to bat" for Riffel, but for the latter's age, amounted to direct evidence in support of Riffel's age discrimination claim and that the same precluded summary judgment for OG&E. Pet. App. "B" at 8a, 9a, 12a.

4. After giving his deposition in June, 1997, Tinkle noticed that John Singleton was intensifying the harassment. Pet. App. "B" at 31a. Tinkle was not accorded the time to do his "paper work" in the mornings and the tone of Singleton's voice changed to that of anger when he spoke to Tinkle. (Disreg'd).

5. In August 1997, Tinkle was ordered by Singleton to drive the 75 Ton Road Crane from Ardmore, Oklahoma

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2. Singleton supervised both Tinkle and Riffel.

to Oklahoma City, Oklahoma, which is a distance of approximately 80 miles. Tinkle had not been assigned to crane duties and responsibilities. In fact, in over 20 years of service with OG&E, Tinkle had driven the 75 Ton Road Crane on only one (1) prior occasion. Driving the 75 Ton Road Crane is extremely uncomfortable, and presents a very bumpy and rough ride. Notwithstanding the fact that Singleton knew of Tinkle's neck problems and that he was still seeing his doctor regarding his neck surgery, he ordered and insisted that Tinkle drive the crane. At the time, Singleton had the regular assigned drivers ready and available to drive the 75 Ton Crane. Pet. App. "B" at 16a-18a, 35a.

6. Because the 75 Ton Road Crane had a small cabin frame, and the fact that Tinkle's body size was too large to be safely housed in the cabin, his head was constantly being jammed into the roof of the cabin as he drove. (Disreg'd). On one such jam or projection, his head was rammed into the roof of the cab with such force that resulted in further injury to his neck. Tinkle reported his neck injury to his supervisor, Singleton. Singleton took Tinkle to the office of the OG&E's doctor, but changed his mind after arriving at the doctor's office and did not allow Tinkle to see the doctor. Instead, Singleton told Tinkle that he was being placed on "light duty"— only to change his mind again, and advised Tinkle that there was not any "light duty" available and sent Tinkle home. Pet. App. "B" at 13a, 15a, 23a.

7. OG&E had in practice a policy of accommodating employees who had been injured on the job. Some of these employees were carried for years in a "light duty" capacity. Pet. App. "B" at 16a.

8. Tinkle was given "light duty" restrictions by his doctor for only a two week period, and could have returned to work in September, 1997, but Singleton refused to allow him to return for reason that Tinkle could not drive the 75 Ton Road Crane — a fact that Singleton knew or should have know long before he ordered him to drive the crane. Pet. App. "B" at 19a.

9. Tinkle was then illegally placed on short term/long term disability.[3] Thereafter, the long term disability insurance coverage was terminated and Tinkle was not reinstated by OG&E. (Disreg'd) and Pet. App. "B" at 18a.

10. Tinkle has no formal education and relied upon OG&E for guidance in administrative matters such as his worker's compensation claim which Singleton advised

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3. Tinkle's doctor had restricted him to "light duty" for two (2) weeks. In order to be placed on "short-term disability", the employee must be disabled far in excess of two weeks. Singleton, rather than allow Tinkle to return to work in a "light duty" capacity (several employees testified via affidavit that "light duty" was routinely given to any one who was injured on the job, and they identified various jobs that were available that Tinkle could have performed), he conditioned Tinkle's return on being able to drive the 75 Ton Road Crane — a substantial change in the "terms and conditions" of his job, as he had only driven the crane one (1) time in a twenty-year period. Singleton intentionally kept Tinkle away for a period sufficient for "short-term" disability to "kick-in", and when that expired, the "long-term" disability started. When the "long-term" disability began, Tinkle was still working the part-time job that he had been working for many years prior to 1997. Singleton knew of Tinkles part time job at all relevant times. The "long-term" insurance carrier investigated Tinkle's ability to work, and took pictures of him working at the part-time job and his "long-term" benefits were not extended for reason that he was not totally disabled.

him to not file a claim. (Disreg'd). Singleton told Tinkle that he was getting old and could not perform the job and that he needed to find another job where he would not be "bouncing in the truck". Had Singleton not assigned him to drive the 75 Ton Road Crane, he would not have injured his neck. Further, his career could have been greatly extended by assigning him to a truck equipped with air-ride-suspension (these vehicles were available). Pet. App. "B" at 19a, 20a.

11. The District Court granted summary judgment on July 17, 2000, holding, inter alia, that Tinkle failed to "allege who denied him a 'light duty assignment' or when this action occurred. It is not disputed that other members of Plaintiff's heavy equipment operator work group had previously been temporarily placed on light duty following various injuries . . ." The district court further rationalized with regard to the retaliation claim that Tinkle "failed" to allege when the "denial" occurred or who participated in this adverse action. Pet. App. "B" at 16a, 35a.

12. Notice of appeal was timely filed to the Tenth Circuit, and thereafter the decision of the District Court was affirmed on June 29, 2001. The Tenth Circuit held: ". . . His allegations that Singleton refused plaintiff's requested truck assignment or assigned him to drive the crane do not rise to the level of an adverse employment action". Pet. App. "A" at 3a, 4a.

13. This Petition for a writ of certiorari followed.

REASON FOR GRANTING THE WRIT

The directions provided by this Honorable Court in *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2268 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Harris v. Fork Lift Systems, Inc.*, 510 U.S. 17 (1993); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); and, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), have been so far departed from by the lower courts that this Court's attention is compelling. In *Ellerth* this Court addressed "tangible employment actions" as being actionable. This Court also addressed non-tangible employment actions as being actionable when the same rises to the level of being "hostile" or "abusive." In *Faragher* at 807 this Court applied the same standard as in *Ellerth*, holding an employer liable to a victimized employee for hostile environment. As a result of the directions in *Faragher* and *Ellerth*, the U.S. Equal Employment Opportunity Commission, *supra*, published and disseminated guidance in evaluating and defining what constitutes "tangible and non-tangible employment actions" by supervisors. The lower courts' decisions in the case at bar mirrors pre-*Faragher* and *Ellerth* misapplications of employment standards with which this Court was confronted and subsequently decided in the aforementioned two cases. Certainly, the EEOC guidelines published as a result of the aforementioned two cases are now in conflict with the decisions of the lower courts.

The lower courts' misapplication of the standard in *Ellerth* and *Reeves* appears on the face of both decisions. The lower court rulings are also in conflict with the substantive issues raised in *Harris* and *Oncale* which are specifically addressed herein.

The petition should be granted for three reasons:

First, the lower courts disregarded and failed to consider evidence supported plaintiff's claim of retaliation. This Court clearly expressed in *Ellerth* that a "tangible employment action", "constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Id.* at 753-754. The action by Singleton "culminated" in the "tangible employment action" — termination. The lower courts erroneously failed to consider the reasonable "circumstances" relevant to the job assignment; but instead, considered only the "nomenclature" of the job assignment, rather then the foreseeable danger and harm of the assignment as perceived by Tinkle, and as a reasonable factfinder could perceive as "abusive". This erroneous misapplication voided any consideration of "severe" and "pervasive" job terms and condition, thereby eliminating any appropriate investigation or inquiry into the existence or non-existence of "tangible employment actions/adverse employment actions". This line of illogical deduction conflicts with this Courts direction in *Ellerth* as referenced above, and fatally jars the foundation of *Reeves* at 150, *Oncale* at 81, and *Harris's* at 23 — all standing, at a minimum, on the principle of an examination of the complete record in determining the applicability of Title VII. Again, this "misapplication" of *Ellereth* and the cited companion cases resulted in summary disposition of Tinkle's retaliation claim. Even if the lower courts were correct in applying the proper standard — to which position Petitioner opposes — the evidence at a minimum is sufficient to establish "abusiveness" which "culminated" in Tinkle's termination. *Ellerth* at 766 remanded to allow plaintiff to amend and for defendant to raise affirmative defenses, if any.

In dismissing Tinkle's claim, the Tenth Circuit held:

> His allegations that Singleton refused plaintiff's requested truck assignment or assigned him to drive the crane do not rise to the level of an adverse employment action. See *id* at 532 (explaining that "mere inconvenience or an alteration of job responsibilities" does not constitute "adverse employment action," which requires a "significant change in employment status".

The lower courts, given the totality of circumstances, failed to consider Tinkle's perception of fear of re-injury to his neck.[4] Certainly, a like "perception" and fear by Breakbill, Tinkle's co-worker, must be weighed as reasonable and in favor of Tinkle — the "nonmoving party". The evidence in the record shows that Tinkle "begged" Singleton to not force him to drive the crane for reason that he was still having problems with his neck and that he was still seeing his doctor for this physical problem. Considering the fact that the co-worker (Breakbill), whose normal job assignment was driving the crane, offered to drive the crane for fear of Tinkle being re-injured is evidence of "severe" and "pervasive" acts in support of an "abusive" environment, which

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4. *Oncale* at 81 provides:

> . . . objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances" . . . Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

neither court below considered.[5] The perception that Tinkle had, as well as that of the co-worker, became a reality — Tinkle sustained a serious re-injury to his neck, which "culminated" in his termination. Surely, a reasonable factfinder could find that the proffered reasons of the Employer to be false. *Ellerth* at 754 "severe and pervasive" conduct of supervisor; *Reeves* at 143 quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). This extreme departure from accepted and usual course of judicial proceedings calls for an exercise of this Court's supervisory power.

Second, the thirty-one page final order of the district court is saturated with "credibility determinations and the weighing of evidence" — even to the point of improperly considering evidence that a jury would not be required to see or believe, such as investigatory or inquiry type letters from plaintiff's counsel to the insurance carrier regarding long term disability benefit of plaintiff.[6] The lower courts failed to give favorable inference to evidence supporting plaintiff's claim of retaliation, both courts failed to follow the standard set by this Court for deciding summary judgments. *Reeves* at 150-151:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

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5. *Oncal, id. See also Reeves* at 149 holding: "It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination"

6. *Reeves* at 151: "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe"

> from the facts are jury functions, not those of a judge." *Liberty Lobby, Inc., supra,* at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

It is undisputed that Tinkle enjoyed a complaint free employment environment prior to his participation in the Riffel case. From the time he rejected the request from OG&E's attorney to confer with her regarding Riffel, until he was terminated, Tinkle experienced a variety of adverse employment actions, which compelled "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences . . ."[7]

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7. The District Court erroneously misstates the time and substance of plaintiff's claim by stating: "These allegations involve actions taken more than two years after the alleged statements by Singleton . . ." (Pet. App. "B" at 14a). The evidence shows: (1) approximately around March, 1997, plaintiff was scheduled to testify via deposition in the Riffel case; (2) plaintiff rejected his employer's (call placed by attorney for OG&E to Tinkle) request to visit with its attorney to discuss the *Riffel* case; (3) in March, 1997, plaintiff underwent surgery on his neck; (4) plaintiff returned to work after his surgery on April 27, 1997; (5) plaintiff immediately detected a difference in treatment by his supervisor, to wit: not being afforded time to do his paper work in the morning; voice was that of anger any time he communicated with plaintiff; scrutinized work more closely; refused plaintiff's request to be assigned to an

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Reeves, *id.* at 155. The lower courts' failure to follow the precedent of a unanimous court in *Reeves* is indeed baffling, as very little is left for one to misunderstand. Ergo, the decision below must be sternly addressed to correct any further drastic departures from this Court's directions, and to guard against weakening the newly published guidelines by EEOC. Further, misapplications of the evidentiary burden of plaintiffs who attempt to prove intentional discrimination through indirect evidence will be thwarted. EEOC "*NOTICE NO. 915.002*" *supra* and *Reeves*, 530 U.S. at 134.

Third, the Tenth Circuit's misapplication of the elements necessary in the case at bar to establish a retaliation claim evidences signs of pre-*Harris*.[8] The court of appeals erroneously

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(Cont'd)

"air-ride-suspension truck, inter alia; (6) plaintiff testified in the Riffel case on June 6, 1997, and his testimony amounted to direct evidence against Singleton in support of Riffel's claim of age discrimination; (7) after his deposition, the harassment escalated until the date in August, 1997 that he was forced to drive a 75 Ton Road Crane that was known by the supervisor and co-workers to be dangerous, considering plaintiff's recent neck surgery and pre-existing back injuries. While the time frame that Singleton made the comments in *Riffel* were two years prior to Tinkles deposition, the retaliation against Tinkle occurred immediately after he "participated" in the "protected activity", and the retaliation intensified after Tinkle gave his deposition on June 7, 1997, and he was terminated in August, 1997. The trial court clearly misstated the time of the "tangible employment action".

8. *Harris* at 22-23:

> Certainly, Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct . . . whether

(Cont'd)

disregarded Tinkle's evidence of harm flowing from the omissions and commissions by Singleton, his supervisor. While *Harris* dealt with the standard determining a "hostile" or "abusive" environment, the Court emphasized that such a showing is actionable conduct under Title VII.

The Court further stated that:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances, which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id. at 17, 23. The record below is saturated with evidence which establish "abusive" conduct toward Tinkle "culminating" in both physical and psychological harm. In *Tinkle*, the lower courts did not consider the distinction between "terms and conditions" of employment relating to "operating" a crane versus "driving" a crane eighty (80) miles — an essential indicia in determining "adverse action" or "tangible employment actions".[9] By doing

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(Cont'd)

> an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include . . . whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance . . . no single factor is required.

9. The EEOC has clearly effectuated this Court's direction in *Ellerth* and has published "guidance" for evaluating and defining

(Cont'd)

so the lower courts served "effectively to insulate an entire category of employment discrimination from review." *Reeves* at 148, *quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993). That is, if the assignment of a specific task or job to an employee will most likely result in physical injury, does such constitute evidence from which a jury could find as "abusive" or in "retaliation" for engaging in the "protected activity"? Especially, where it is shown that the assignment was not part of the plaintiff's normal duties, and others who normally performed the job were present, ready and able to perform the assignment without involving any risk of harm or injury.

I. The Decisions Below Misapplies The Evidentiary Burdens Of Plaintiffs Who Attempt To Prove Intentional Discrimination Through Indirect Evidence

In summarily dismissing Tinkle's claim of retaliation, the circuit court applied the "mere inconvenience" standard of *Sanchez* in a manner which resembled form over substance. In so doing the circuit court improperly disregarded the totality of plaintiff's evidence and gave narrow interpretation to the actionable categories of adverse employment actions. In *Oncale* this Court directed that ". . . work place behavior often depends on a constellation of surrounding circumstances, expectations,

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(Cont'd)

"tangible employment actions" (EEOC "Notice", *id.*) The principle in *Crady* recognized a tangible employment action as including ". . . other *indicies* that might be *unique* to a particular situation" (emphasis added). Black's Law Dictionary, Rvsd. 4th Ed., defines *indicia* as: "The term is much used in the civil law in a sense nearly or entirely synonymous with circumstantial evidence. It denotes facts which give rise to inferences, rather then the inferences themselves. *Graham Ice Cream Co. v. Petros*, 127 Neb. 172, 254 N.W.869."

and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* at 77-78. The circuit court elected not to undertake an *Oncale* analysis.

It is apparent in *Ellerth*, that ". . . a tangible action taken by a supervisor becomes for Title VII purposes the act of the employer." *Id.* at 762. The Court further stated: ". . . A tangible employment action constitutes a significant change in employment status, such as . . . reassignment with significant difference in responsibilities. . . ." *Id.* at 761. In contrast, the circuit court quoted *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132 (CA7 1993), as did this Court at page 136 "('A material adverse change might be indicated by a termination of employment, . . . or other indicies that might be unique to a particular situation')". *Id.* at 761. Despite the fact that Tinkle suffered injury as a result of a work assignment, given to him by his supervisor, and it was foreseeable that the assignment would cause the injury that did in fact result, both lower courts held that those allegations did not state a "adverse employment action" under the first prong of *Sanchez*. This failure is reviewable error in light of *Harris* that it is enough to show that the harm alleged is "physically threatening" or "abusive". *Id.* at 17, 23.

Moreover, this Court in resolving *Ellerth* found that the employee, Ellerth, did not allege that she suffered a tangible employment action, which would deprive *Ellerth* of the availability of the affirmative defense of knowledge that the supervisor had committed the acts of which she complained. Notwithstanding failure to plead a tangible employment action, this Court held that "Ellerth is still subject to vicarious liability . . ." for the supervisor's activity. In so holding, the Court also noted that "Burlington should have an opportunity to assert and prove the affirmative defense to liability." In the case at bar the evidence

supports not only "tangible action", but supports the theory that it was efficaciously calculated by Singleton to adversely alter the terms and conditions of Tinkle's employment.

In like vein, *Reeves*, held that a plaintiff may survive judgment as a matter of law by submitting two categories of evidence: ". . . first evidence establishing a 'prima facie case,' as that term is used in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802 (1973); and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. . . ." A review of the evidence in matters involving summary judgment under Rule 56, the Court in *Reeves* reasoned:

> . . . In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986); See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.
>
> In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990); *Liberty Lobby, Inc.*,

> *supra* at 254; *Continental Ore Co. v. Union Carbide & Corbin Corp.*, 370 U.S. 690, 696 n.6 (1962). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, *supra* at 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See *Wright & Miller* 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* at 300.

The presence of supervisory action of *Ellerth* is equally applicable to satisfy the prima facie showing of retaliation.[10]

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10. After *Ellerth*, the United States Equal Employment Opportunity Commission (hereinafter "EEOC") published "NOTICE", No. 915.002 dated June 18, 1999, *SUBJECT*: Enforcement

Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors. *PURPOSE*: "This document provides guidance regarding employer liability for harassment by supervisors based on sex, race, color, religion, national origin, age, disability, or protected activity. In Paragraph IV.B. (Definition of "Tangible Employment Actions") the EEOC, in defining tangible employment actions, relied on this Court's decision in *Ellerth*, 118 S. Ct. 2269; *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) at 2284-85; and *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 152 (3d Cir.

(Cont'd)

In this case, this court need only perform a superficial review of the findings entered by the district court and subsequently adopted by the circuit court to resolve that Tinkle was not afforded the benefit of the favorable inferences of *Reeves*.[11] Additionally, it must be noted that there is ample evidence that the employer's reason for the decision to make Tinkle drive the crane is false. Most relevant to this conclusion is the fact that the two other persons who were assigned to drive the 75 Ton Road Crane were present at the time Singleton ordered Tinkle to drive, and one stated that he would drive instead of Tinkle. Because Tinkle came forth with prima facie evidence and proof of mendacity, summary judgment was precluded.

(Cont'd)

1999) ("a supervisor can only take a tangible adverse employment action because of the authority delegated by the employer . . . and thus the employer is properly charged with the consequences of that delegation.") The EEOC , based on this Court's ruling in *Ellerth* at 2268 and 2270; and *Faragher*, at 2284, 2291, and 2293, listed "examples of tangible employment actions" — which included, among others, "work assignment." In so doing, the EEOC concluded "any employment action qualifies as 'tangible' if it results in a significant change in employment status. For example, significantly changing an individual's duties in his or her existing job constitutes a tangible employment action regardless of whether the individual retains the same salary and benefits."

11. Because he was still recovering from neck surgery and still having problems with his neck, Tinkle begged Singleton to not force him to drive 80 miles in the 75 Ton Road Crane. Tinkle, realizing the danger in **driving** the road crane, was fearful that he would re-injure his neck. At the time this order was given, both men who were assigned to drive and operate this crane were present and available to carry out the assignment. Further, one of the men, Breakbill, offered to drive the crane because he was fearful that the drive would further aggravate Tinkle's condition. However, Tinkle, fearing the rath of Singleton and that Singleton would retaliate against both him and Breakbill, was forced to decline the offer. (Disreg'd).

II. The Misapplication Of *Sanchez* Insulates An Entire Category From Review

One consistent theme arises from this Court's leading employment decisions in *Reeves* and *Ellerth*: this Court has exercised great care to review rulings which depart from settled practices in identifying, analyzing, and eradicating practices which offend its continued commitment to a non discriminatory work place. It is equally clear that the examples of actionable conduct referenced in those decisions is not exhaustive. The lower courts' departure from this practice in categorizing Tinkle's complaints as "mere inconveniences" and in doing so, failed to follow this Court's direction that trial court should not "treat discrimination differently from other ultimate questions of fact." *Reeves* at 148.

In this case, the Tenth Circuit cited *Sanchez* for the proposition of establishing a prima facie case of a retaliation claim. The court held that a plaintiff must show: "1) she was engaged in opposition to Title VII or ADEA discrimination; 2) she was subjected to adverse employment action; and 3) a causal connection existed between the protected activity and the adverse employment action." *Id.* The principal reason in denying Tinkle's appeal was that Tinkle failed to show that Singleton's actions in refusing to assign Tinkle to a truck with "air-suspension-ride" or the assignment of him to **drive** the 75 Ton Road Crane did not rise to the level of an "adverse employment action". (Pet. App. "A" at 3a, 4a). The lower courts were reviewing the evidence in a manner that disregarded evidence favorable to Tinkle and failed to draw all reasonable inferences in his favor. Specifically, Tinkle's last injury in August 1997, resulted from being forced to drive the 75 Ton Road Crane approximately 80 miles. While he was qualified to operate the crane, there is a big difference in "operating" the vehicle and "driving" it on the highway. He had only driven the crane one (1) other time in twenty (20) years of

employment with OG&E. The lower courts failed to afford Tinkle a favorable inference under the circumstances of his neck injury and other past injuries as being the reasons for driving the road crane only (1) one other time.

III. The Courts' Refusal To Consider Favorable Inferences Treats Discrimination Differently From Other Ultimate Questions Of Fact

The U.S. Equal Employment Opportunity Commission's "Notice" at para I "Introduction", *id.*, clearly enunciates this Courts mandate in *Ellerth* (524 U.S. at 762) for Title VII and other "protected activity" purposes ". . . from the perspective of the employee, the supervisor and the employer merge into a single entity". Throughout Tinkle's pleadings in the trial court, he complains about adverse treatment inflicted by Singleton (also much of the same is reflected is final order of the trial court), but nevertheless the trial court concluded:

> Plaintiff next alleges that the "denial of air-ride-suspension truck" supports his retaliation claim. Plaintiff avers in his responsive affidavit that Tom Howard and "Breakbill" are assigned to trucks equipped with air-ride-suspension. However, again, Plaintiff makes no specific allegations as to when the "denial" occurred or who participated in this alleged adverse action. Plaintiff also does not allege that such an accommodation was given to other co-workers as a result of an injury. In Plaintiff's deposition testimony, he stated that no work restrictions were placed on him by his treating physician after his March 1997 neck surgery. There is substantial evidence that operating heavy equipment such as cranes was a normal part of Plaintiff's job as well as the jobs of

> other OG&E employees having the same position as the Plaintiff. Under these circumstances, no inference of retaliation is shown by Plaintiff's allegation of a "denial of air-ride-suspension truck."

Pet. App. "B" at 34a, 35a.

Just a cursory review of the above excerpt portion of the trial court's order reveals glaring dissensions with *Ellerth*, *Faragher*, and *Reeves*. As example, There should there have been a "favorable inference" drawn from: (1) that a "request" for "air-ride-suspension" was made, considering that a 'denial' of the same was confirmed by the court; (2) that the 'denial' was made in the relevant and material time frame; (3) that since others were assigned to "air-ride-suspension" trucks, it is reasonable to infer that Tinkle, with 20 years of seniority, could be or should have been assigned such a truck — especially given his neck and back injuries; (4) that the complaint was registered with his supervisor, John Singleton; (5) that since Tinkle had driven the crane only one (1) time in 20 years that this was not a part of his normal duties. Thus, applying *Ellerth*, as a supervisor, the acts of Singleton and that of OG&E "merge as a single entity." *Id.* at 762.

Without question a rational factfinder could find that the assignment to the road crane, under these "indicies", *Crady*, was in retaliation for his testimony against Singleton. A reasonable jury could also conclude that Singleton's refusal to allow Tinkle to file a worker's compensation claim was in retaliation for his testimony against Singleton. It is also reasonable to infer that a jury could conclude that Singleton's refusal to allow Tinkle to perform "light duty" when others that were injured were routinely assigned to light duty. Ironically, the district court erroneously concluded that Tinkle's failure to identify the age groups of those

who were allowed "light duty" was a bar to his age discrimination claim which is not being raised herein. However the district court used its finding that Tinkle failed to identify the ages of other individuals who had been given "light duty" to bar his claim of age discrimination. The same evidence that allowed the district court to conclude that others had indeed been afforded "light duty" was the evidence that supports a finding the Tinkle made a prima facie showing of retaliation. As example, the court did agree that others were given light duty; and, that finding is determinative that light duty assignments were available to Tinkle, and inferentially that Tinker should have been assigned a air suspension ride truck. (Pet. App. "B" at 15a, 16a).

The district court further found that there was no evidence that Singleton was aware of the adverse testimony given by Tinkle in the Riffel case. This position again presupposes that a reasonable factfinder could not infer that: (1) Tinkle's assignment to drive the 75 Ton Road Crane; (2) Tinkles resultant injury; (3) Singleton's failure to allow Tinkle to file a worker's compensation claim; and (4) Tinkle's ultimate termination was caused by Tinkle's testimony against Singleton.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEWIS BARBER, JR.
Attorney for Petitioner
1528 N.E. 23rd Street
Oklahoma City, OK 73111
(405) 424-5201

APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JUNE 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 00-6280
(D.C. No. 99-CV-1132-P)
(W.D. Okla.)

DAVID R. TINKLE,

Plaintiff-Appellant,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant-Appellee.

ORDER AND JUDGMENT*

Before **EBEL**, **PORFILIO**, and **KELLY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix A

Plaintiff David Tinkle appeals from the magistrate judge's summary judgment dismissal of his complaint against his former employer, Oklahoma Gas and Electric Company (OG&E).[1] Plaintiff alleged age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34; interference with his right to receive benefits in violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1140; intentional or negligent infliction of mental or emotional distress; and retaliation for his participation in another employee's age discrimination claim. On appeal, plaintiff challenges only the dismissal of his retaliation claim.[2] Therefore, all other issues that were decided by the magistrate judge are considered waived. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994). We affirm.

The parties are familiar with the facts, which are fully set out in the magistrate judge's very thorough thirty-one page order. Thus, we will only briefly repeat those necessary

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1. The parties consented to disposition of this case by the magistrate judge. *See* 28 U.S.C. § 636(c)(3).

2. At the conclusion of his brief, plaintiff summarily requests the court to also reverse his age discrimination claim. Plaintiff does not otherwise argue his age discrimination claim in his brief. Accordingly, we do not address this claim on appeal. *See Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555, 1558 n.1 (10th Cir. 1992) (stating an issue mentioned in brief on appeal, but not addressed, is waived), *modified on other grounds on reh'g*, 995 F.2d 992 (10th Cir. 1993); Fed. R. App. P. 28(a)(9)(A) (requiring that argument contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

to resolve the appeal. Plaintiff was employed by OG&E in its heavy hauling department. In March 1997, he was listed as a witness against OG&E in an age discrimination claim brought by another OG&E employee, Don Riffel, but he refused to meet with OG&E's attorney to discuss the Riffel case. Plaintiff also had neck surgery that month. When he returned to work in April, his supervisor, John Singleton, refused plaintiff's request to be assigned to drive an air-suspension ride truck, which has a softer ride than other trucks. Plaintiff claims his request was refused because of his participation in the Riffel case.

Plaintiff gave his deposition in the Riffel case in June 1997, providing some evidence that Singleton discriminated against Riffel because of his age. In August 1997, Singleton ordered plaintiff to drive a seventy-five ton crane. Plaintiff claims that this crane has a rough and bumpy drive and that he injured his neck driving it. He claims Singleton made him drive the crane in retaliation for his deposition testimony. Thereafter, plaintiff's doctor restricted him to light duty work assignments for two weeks, and plaintiff alleges Singleton refused to give him available light work assignments.

To establish a prima facie case of retaliation, plaintiff must show he was engaged in protected opposition to age discrimination, he was subjected to adverse employment action, and a causal connection existed between the protected activity and the adverse employment action. *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 533 (10th Cir. 1998). We have reviewed the briefs and the record on appeal, and are not persuaded by plaintiff's claims of error. His allegations that Singleton refused plaintiff's requested truck assignment

or assigned him to drive the crane do not rise to the level of an adverse employment action. *See id.* at 532 (explaining that "mere inconvenience or an alteration of job responsibilities" does not constitute "adverse employment action," which requires a "significant change in employment status" (quotations omitted)). Further, there is no record support for plaintiff's assertion that Singleton refused him available light-duty job assignments after he injured his neck in August. The magistrate judge properly disregarded statements in plaintiff's affidavit that contradicted his earlier sworn deposition testimony. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1224 n.2 (10th Cir. 2000). Plaintiff's evidence demonstrates only that some employees were given short-term, light-duty assignments for various medical reasons. However, plaintiff failed to present any evidence of any specific light-duty work that was available for him to do after his injury and it is undisputed that plaintiff never applied for any light-duty work assignments.

Plaintiff also failed to present evidence that a causal connection existed between his participation in the Riffel case and the alleged adverse employment actions. He presented no evidence that Singleton had any knowledge that plaintiff was a witness in the Riffel case, had refused to cooperate with an OG&E attorney or had given deposition testimony implicating Singleton. A party opposing summary judgment cannot rest upon his pleadings, but "must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which [he or she] carries the burden of proof." *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996).

Appendix A

The magistrate judge thoroughly addressed the arguments plaintiff raises on appeal, and we AFFIRM for substantially the same reasons as set forth in the magistrate judge's order filed on July 17, 2000.

Entered for the Court

John C. Porfilio
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DATED AND FILED JULY 17, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-99-1132-P

DAVID TINKLE,

Plaintiff,

vs.

OG&E,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56(b), to which Plaintiff has responded. The parties have previously consented to proceed before the undersigned Magistrate Judge pursuant to 28 U.S.C. §636(c)(1).

Plaintiff filed this cause of action on August 4, 1999, seeking damages and injunctive relief against Defendant, his former employer. The Complaint alleges a violation of the Age Discrimination in Employment Act ("ADEA") and a violation of 29 U.S.C. §1140 of the Employee Retirement Income Security Act ("ERISA").[1] Plaintiff also alleges a

1. Although Plaintiff alleges in the Complaint that 42 U.S.C. §1983 provides an additional statutory basis for his cause of action, Plaintiff's Complaint contains no specific allegations directed toward (Cont'd)

pendent state tort claim of intentional or negligent infliction of emotional distress and a claim of retaliation under 29 U.S.C. §623(d) of the ADEA.

Summary judgment may be granted only where the pleadings and any supporting documentary materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the Court reviews the evidence and the inferences drawn from the record in the light most favorable to the nonmoving party. *Kaul v. Stephan*, 83 F.2d 1208, 1212 (10th Cir. 1996); *Calhoun v. Gaines*, 982 F.2d 1470, 1472 (10th Cir. 1992); *Manders v. State of Oklahoma*, 875 F.2d 263, 264 (10th Cir. 1989). A dispute is "genuine" if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Material facts" are "facts which might affect the outcome of the suit under the governing law." *Id.* Additionally, if the moving party demonstrates an absence of evidence regarding an issue on which the nonmoving party will bear the burden of proof at trial, the nonmoving party can defeat summary judgment only by designating with evidence outside of the pleadings "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

(Cont'd)
this provision of the Civil Rights Acts, nor does Plaintiff allege state action on the part of Defendant, a private corporate entity. Accordingly, it appears that the reference to 42 U.S.C. §1983 is merely surplusage. Nevertheless, if Plaintiff is asserting a claim under 42 U.S.C. §1983, Defendant is entitled to summary judgment on this claim in the absence of the requisite showing of state action. *See e.g., Flagg Bros. v. Brooks*, 436 U.S. 149, 155-157 (1978).

Appendix B

The following uncontroverted material facts have been considered in resolving Defendant's dispositive Motion[2]:

1. Plaintiff received notice from American Fidelity that American Fidelity was stopping Plaintiff's long-term disability payments.

2. Plaintiff is now and has for seven years worked to take care of a car wash. He picks up paper and trash, washes down the bays, and puts soap and detergent in barrels.

3. Plaintiff had back surgery in 1985, following which he was placed on light duty for a short time.

4. Other members of Plaintiff's work group have previously been temporarily placed on light duty following various injuries, including Don Riffel who was placed on light duty for a little over a month.

5. Plaintiff started keeping written notes as early as 1995 of job-related issues because he felt he was

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2. In many instances in Plaintiff's Response to Defendant's motion, Plaintiff makes broad denials that are either inconsistent with his own deposition testimony or contain argumentative conclusions unsupported by facts showing a dispute exists. Plaintiff cannot simply deny or alter statements made in his deposition. *Bohn v. Park City Group, Inc.*, 94 F.3d 1457, 1463 (10th Cir. 1996) (when affidavit contradicts deposition testimony, "the affidavit should not be considered"). Plaintiff also cannot deny or alter the terms of the disability policy in question, which, contrary to Plaintiff's assertions, are attached to Defendant's Motion.

being harassed by John Singleton, and he felt that John Singleton, who was not his supervisor at that time, was out to get him. According to Plaintiff, Mr. Singleton harasses "anyone he wants to."

6. It was part of Plaintiff's job at OG&E even before 1980 to operate a crane. Between 1980 and 1990 when Plaintiff worked in the heavy hauling department at OG&E Plaintiff operated a crane two to three times a week to load and unload equipment.

7. When Plaintiff was released by his doctor to return to work after his March 1997 neck surgery, Plaintiff's doctor told him he could not continue very much longer hauling and driving the semis and operating heavy equipment.

8. Plaintiff reinjured his neck on August 21, 1997, while driving a road crane and after that he was never medically released to return to the full duty of his position with OG&E.

9. Plaintiff applied for and received disability payments from American Fidelity following his August 1997 injury. Plaintiff understands that American Fidelity oversees and administers the long-term disability program adopted by OG&E for its employees.

10. Periodically, American Fidelity requested documents from Plaintiff's doctor or information from Plaintiff.

11. Plaintiff understood that he had to fill out forms as requested by American Fidelity in order to continue receiving employment disability benefits.

12. When Plaintiff attempted to return to his previous job around May 24, 1999, he had not been released to full duty by his doctor.

13. Because of Plaintiff's medical restrictions, he could not return to his previous job at OG&E, and Plaintiff never applied for any other positions at OG&E.

14. The most recent medical information provided by Plaintiff to OG&E and signed by Dr. Schimandle reflects the following restrictions: no lifting or carrying of objects weighing more than twenty-five pounds; no repetitive use of the hands, wrists, or fingers; and no operating of heavy equipment.[3]

15. Under the terms of the disability plan offered to OG&E employees, an employee is entitled to receive benefits for the first 24 months of disability if the employee "is disabled and unable to do substantially all of the duties of his employment," and after that the employee is entitled to receive benefits if he "is disabled and completely unable to engage in any occupation for wage or profit for which he is reasonably qualified by training, education, or experience."

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3. Plaintiff contends in his Response to Defendant's Motion that this is a "fraudulent" document but does not allege any facts to support this conclusion or dispute the facts contained in the document.

Appendix B

17. American Fidelity received a letter from Lewis Barber, Jr., Plaintiff's attorney, indicating that Plaintiff was interested in appealing American Fidelity's denial of long-term disability benefits to Plaintiff. The letter was dated June 5, 1999.

18. Ms. McKinney responded to Mr. Barber by letter dated July 22, 1999, asking Mr. Barber to forward to American Fidelity the information upon which the appeal is based and to include any information that will allow the company to understand fully the reasons he felt the decision to terminate benefits beyond twenty-four (24) months should be reevaluated.

19. Barber responded by letter dated August 2, 1999: "I will meet with my client no later than Friday of this week and forward to you the information you requested."

20. To date, American Fidelity has not received information from Barber or Plaintiff to pursue an appeal.

21. Plaintiff received a letter from American Fidelity advising him: "If you disagree with this decision, you have the right to appeal. Your appeal must be made in writing 90 days from the date of this letter and should include any additional information which will help us evaluate the claim." Plaintiff admits that he never appealed the decision, but he gave the letter to his attorney.

Appendix B

I. ADEA Claim

Defendant seeks summary judgment as to Plaintiff's age discrimination claim. Under the ADEA, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1). " 'A plaintiff who seeks to prove that an employer discriminated against him or her can use either direct or circumstantial evidence.' " *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000) (quoting *Ingels v. Thiokol Corp.*, 42 F.3d 616, 620 (10th Cir. 1994)).

"A plaintiff proves discrimination through direct evidence by establishing proof of an existing policy which itself constitutes discrimination." *Id.* (quoting *Ramsey v. City & County of Denver*, 907 F.2d 1004, 1008 (10th Cir. 1990), *cert. denied*, 506 U.S. 907 (1992)). As evidence of age discrimination, Plaintiff points to the comments by his supervisor, John Singleton, directed toward another employee in Plaintiff's work group, Don Riffel, (1) that Riffel was an "old man," (2) that after Riffel was fired Singleton was "not going to back that old man," and (3) that "if it had been anybody else, I would have gone to bat for him. You know how old men are, they are — they aren't going to change." Plaintiff's Response, at 19. Plaintiff asserts that these statements by Singleton provide direct evidence that Defendant had a policy of making the age of older employees "a factor in weighing their value and retention in the work force." Plaintiff's Response, at 19.

Appendix B

The statements attributed to Singleton to which Plaintiff refers were taken from Plaintiff's own deposition in another age discrimination action brought by Riffel against OG&E in this Court. Plaintiff's deposition was taken in that matter on June 6, 1997. Defendant's Motion, Ex. G. In July 1997, the district court entered summary judgment in favor of OG&E. Defendant's Motion, Ex. H. However, on appeal, the Tenth Circuit Court of Appeals issued a decision on March 31, 1998, finding that Plaintiff's deposition testimony provided some direct evidence of age discrimination against Riffel sufficient to overcome summary judgment and reversing the summary judgment previously entered. Defendant's Motion, Ex. I (*Riffel v. OG&E*, No. 97-6304 (10th Cir. Mar. 31, 1998) (Order and Judgment)).

Plaintiff's deposition testimony in the *Riffel* case concerned remarks made by Singleton directed primarily toward Riffel, not Plaintiff. The remarks were not made within close temporal proximity to any of the alleged adverse employment actions taken against Plaintiff. Riffel was terminated in March 1995, and Plaintiff testified in the *Riffel* deposition that the remarks were made in a meeting a few days after Riffel was terminated. Defendant's Motion, Exs. H, I; Defendant's Reply, Ex. A, at 23, Although Plaintiff alleges in his Complaint that Defendant "has continuously discriminated against him because of his age," in Plaintiff's responsive affidavit Plaintiff describes an incident in August 1997 in which he was ordered by Singleton to drive a 75-ton road crane "while I was still recovering from neck surgery." Plaintiff also alleges that Singleton refused to allow Plaintiff to drive an "air-ride-suspension" truck or to give Plaintiff a "light duty" assignment following his return to work from

neck surgery on April 28, 1997. These allegations involve actions taken more than two years after the alleged statements by Singleton, and Singleton's alleged statements do not provide direct evidence of an existing policy by OG&E which itself constitutes discrimination.

Although in the *Riffel* case the Tenth Circuit Court of Appeals concluded that the age-related comments attributed to Singleton were "not an instance of a stray remark in the work place . . . ," *see* Defendant's Motion, Ex. 1, at 4, those same comments, allegedly made more than two years prior to any alleged adverse employment actions involving Plaintiff and directed primarily toward another employee, constitute only "[i]solated comments, unrelated to the challenged action, [that] are insufficient to show discriminatory animus" in this case. *Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 531 (10th Cir. 1994). The fact that the same supervisor was involved is not alone sufficient to create any ***nexus*** between the earlier alleged comments directed toward Riffel and the alleged adverse actions taken in 1997 or subsequently involving the Plaintiff.

To establish a claim of age discrimination under the ADEA based on circumstantial evidence, the plaintiff must show: 1) he is a member of the class protected by the statute; 2) he suffered an adverse employment action; 3) he was qualified for the position at issue; and 4) he was treated less favorably than others not in the protected class. *Sanchez v. Denver Public Schools*, 164 F.3d 527, 531 (10th Cir. 1998). "Once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the action. If the defendant does

so, the plaintiff must show the defendant's preferred reasons are pretextual." *Id.*

Plaintiff alleges three succinct adverse employment actions: 1) the refusal of his supervisor, Singleton, to assign him to "light duty" or to operate trucks equipped with air-ride-suspension when he returned to work in April 1997 following his neck surgery, and in particular the action of Singleton in August 1997 in ordering Plaintiff to drive a 75-ton road crane which has a "very tough and bumpy ride" and "relatively low" roof space in its cabin; 2) his placement on short-term disability on or about August 25, 1997; and 3) OG&E's refusal to reinstate him to his previous job on or about May 24, 1999. In his deposition testimony, Plaintiff also stated that he was treated differently due to age discrimination because his supervisor, John Singleton, "was all the time telling me that I ought to find me another job. My . . . I was getting older, my body was wearing out, and I couldn't continue to do this, and my doctors made the same statement." Defendant's Motion, Ex. C, at 105. Plaintiff testified that by the phrase "continue to do this," his supervisor and his doctor were referring to heavy manual labor and "bouncing in the truck." *Id.*

There is no dispute that during all relevant periods of time Plaintiff was and is a member of the class protected by the ADEA. Plaintiff first contends he was treated differently because of his age with regard to his job responsibilities between April 1997, when he returned to work following neck surgery, and August 1997, when he reinjured his neck. Plaintiff presents the affidavits of himself and three other present or former OG&E employees in response to

Defendant's Motion. These affiants aver that some OG&E employees who had been hurt or injured were placed on "light duty" assignments following their injuries, and one of the affiants, Don Riffel, avers that he was "placed on restricted duty for several months" following an on-the-job injury. Plaintiff's Response, Exs. 2, 3, 4. However, none of the ages of these other employees or Riffel is given, and none of the affiants stated that only younger employees or that all injured employees were given special accommodations in their subsequent work responsibilities.

The employees aver that "special training was necessary" to drive and operate the 75-ton road crane, and that "very few" employees were assigned to drive and operate the 75-ton road crane. Plaintiff's Response, Exs. 2, 3. Plaintiff and the affiants identified Rick Brakebill, Craig Sitton, and Mike Neary as individuals who had been assigned to drive and operate the 75-ton road crane. Plaintiff's Response, Exs. 1, 2. Plaintiff avers that "Breakbill (sic) is also much younger than me." Plaintiff's Response, Ex. 1, at 3. In his affidavit, Plaintiff also avers that on the date he was ordered by Singleton to drive the 75-ton road crane, "the regular crane operators, Rick Brakebill and Mike Neary were both on duty and available to drive the road crane." Plaintiff's Response, Ex. 1, at 3. However, Plaintiff concedes that he had driven the 75-ton road crane once before, indicating that Plaintiff was one of the "very few" employees who had been assigned previously to drive the 75-ton road crane.

Plaintiff stated in his deposition that he felt Singleton harassed him beginning in 1985, Defendant's Motion, Ex. C, at 137. However, Plaintiff also stated that Singleton

harassed other unidentified employees as well. *Id.* Plaintiff stated that it was common for the nine or ten heavy hauling department employees to "fill[ ] in" for the regular crane operators when necessary, and Plaintiff had operated cranes two to three times a week. Defendant's Motion, Ex. A, at 35-36. There is no dispute that Plaintiff's doctor released him to full duty after his March 1997 neck surgery, indicating no job accommodations were considered medically necessary. Defendant's Motion, Ex. A, at 20. Plaintiff avers in his responsive affidavit that he "begged John Singleton to not make me drive the 75-ton road crane back from Ardmore, and in doing so, I reemphasized that due to my back and neck injuries that I did not believe I could handle the assignment." However, Plaintiff's deposition testimony contradicts his affidavit. In his deposition, Plaintiff stated that when he was ordered to drive the crane, he told his supervisor "I didn't need to be in the crane; I knew how to drive it . . . [I]t was too rough," and Plaintiff stated he did not specifically inform Singleton that he was afraid he would get hurt if he drove the crane. Defendant's Reply Supplement, at 52-53. Plaintiff does not explain the contradiction between the statements in his affidavit and in his deposition testimony. The facts were well within his knowledge at the time of Plaintiff's deposition. Accordingly, Plaintiff has not created a material issue of fact without his contradictory affidavit. *See Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986) ("courts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue").

Both Raymond Rigsby and Glen Chartney, who also are employed in the heavy hauling department at OG&E,

testified in depositions that they had driven the 75-ton road crane. Chartney averred that he had worked for OG&E for 26 years and he had driven this crane 20 times. Rigsby averred that he had worked for OG&E for eighteen years and he had driven the crane at least 12 times a year. Both of these employees testified that driving the crane was part of their job, even when the regular crane operators were available to drive the crane. Defendant's Supplement to Motion (Docs. 52, 53), Exs. E, F. There is nothing in the Plaintiff's evidence to indicate that Plaintiff's age was a motivating factor in determining his job responsibilities. Plaintiff apparently believes special accommodations should have been made as a result of his neck and back injuries, but he fails to demonstrate that a disputed issue of fact exists with regard to the motivation of the supervisor in refusing to make these special accommodations. Plaintiff has not shown a *prima facie* case of age discrimination as to the allegations regarding his job responsibilities between April and August 1997, because Plaintiff has not raised a disputed issue of fact concerning the fourth requirement for an ADEA claim of less favorable treatment than others not in the protected class.

Plaintiff contends that his placement on short-term employment disability in August 1997 was an adverse employment decision motivated by age discrimination. However, Plaintiff stated in his deposition that he reinjured his neck on August 21, 1997, and avers in his affidavit that his doctor placed him on a "light duty" work restriction on August 25, 1997. Plaintiff stated in his deposition that doctors never released him to return to his previous job after that date. Defendant's Motion, Ex. B, at 39-40. Moreover, it is

undisputed that Plaintiff understands that American Fidelity oversees and administers the disability program adopted for OG&E employees, and that American Fidelity requested information from Plaintiff and medical documents or statements from Plaintiff's doctor during the two-year period that he was on disability.

Plaintiff avers that on August 25, 1997, when he provided Singleton with his doctor's note reflecting he was restricted to light duty, that Singleton conferred with Singleton's supervisor, Mr. Newton, and informed Plaintiff that the company would "take your doctor's recommendation and put you on light duty." Plaintiff's Response, Ex. 1, at 4. Plaintiff avers he was then told to go home because Singleton "did not have any light duty for me." *Id.* Plaintiff avers he was allowed to work light duty for two days filling in for a secretary who was on vacation but was told that he would then "have to use disability leave until I was 100%." *Id.*, at 5. Plaintiff further avers that the paperwork was processed by "[m]y supervisor and Belleva Johnson of the Human Resources Department. . . ." *Id.*

Although Plaintiff contends he was placed on light duty work restrictions by his treating doctor only for two weeks, there is ample uncontroverted evidence in the record reflecting that after August 25, 1997, doctors who examined Plaintiff concluded Plaintiff is unable to perform the requirements of his previous heavy equipment operator position. Defendant's Motion, Exs. 3, 4; Supplement to Defendant's Motion (Doc. #31), Ex. 12. The only reasonable inference that can be drawn from the evidence is that Plaintiff was injured in August 1997, and because his doctor placed

him on light duty work restrictions and no light duty work was available for an individual in Plaintiff's position, Plaintiff took employment disability in order to receive continuing income and keep his job as long as possible.

Plaintiff contends that undue influence was placed on him to take disability instead of filing a workers' compensation claim. In response to Defendant's Motion, Plaintiff avers in his affidavit that Singleton told Plaintiff that he "would not allow" Plaintiff to file a workers' compensation claim" and that the company "was not going to pay any workers' compensation to me." Plaintiff's Response, Ex. 1. However, Plaintiff's responsive affidavit contradicts his deposition testimony, in which Plaintiff stated he never inquired about workers' compensation and was never told he could not file a workers' compensation claim. Defendant's Reply, Ex. B, at 18, 27. Plaintiff does not attempt to explain this contradiction, and the facts were well within his personal knowledge at the time of his deposition. Accordingly, Plaintiff has not presented a disputed issue of fact concerning the fourth requirement for an ADEA claim with his allegation that he was forced to take employment disability benefits. *See Franks*, 796 F.2d at 1237.

Plaintiff next alleges that OG&E's refusal to reinstate him to his previous position on or about May 24, 1999, supports his claim of age discrimination. Defendant moves for summary judgment as to this claim on the basis that Plaintiff was not qualified for his previous position at the time OG&E refused to reinstate him to that position. It is not disputed that after August 21, 1997, Plaintiff was never medically released to return to the full duties of his previous

position as a heavy equipment operator. Accordingly, Plaintiff has not demonstrated with this allegation that a material issue of fact exists concerning the second requirement for an ADEA claim.

Finally, Plaintiff stated in his deposition that he was treated differently due to age discrimination based on the statements by Singleton that Plaintiff was "getting older" and his "body was wearing out" and he "couldn't continue to" perform heavy manual labor or sit in a "bouncing" truck. Plaintiff conceded in his deposition that his doctor had also stated to Plaintiff following his March 1997 neck surgery that Plaintiff "could not continue very much longer hauling and driving the semis and operating heavy equipment." Defendant's Motion, Ex. A, at 43. The only reasonable inference to be drawn from Singleton's statement is that Plaintiff's physical capacity to perform the heavy demands of his job was diminishing to the point that Singleton believed Plaintiff needed to find lighter work.

Plaintiff does not point to any particular employment action as being related to these alleged statements or even allege when the statements were made. The statements express Singleton's personal opinion, and "[a]t most, such statements [of personal opinion] provide circumstantial evidence of discriminatory intent because they 'require the trier of fact to infer that discrimination was a motivating cause of an employment decision.' " *Stone*, 210 F.3d at 1137 (quoting *EEOC v. Wiltel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996)). In this case, Defendant strongly argues that Plaintiff was no longer qualified for his position on August 25, 1997, and thereafter because of work restrictions placed on him

by his doctor and other examining physicians. Plaintiff vehemently argues in response that on August 25, 1997, Plaintiff's doctor placed only a 2-week light duty restriction on Plaintiff. However, Plaintiff stated in his deposition that he was never medically released to the full duties of his heavy equipment operator position after August 25, 1997. Although Plaintiff stated in his deposition that on August 25, 1997, he was told to go home because no light duty was available at that time, Plaintiff avers in his responsive affidavit that "there was work that I could have performed for the specified time and longer." Plaintiff's Response, Ex. 1, at 5. Plaintiff provides no evidence of any specific work that was available to him with his work restrictions on or after August 25, 1997, and it is not disputed that Plaintiff never applied for a different position at OG&E. Even if there was light duty work Plaintiff could have temporarily performed on or after August 25, 1997, there is no evidence that Plaintiff could have returned to the full duties of his previous job after that date, and he has not presented a disputed issue of fact that age discrimination was a motivating factor in any adverse employment decision. Accordingly, Defendant is entitled to summary judgment concerning Plaintiff's claim of age discrimination under the ADEA.

II. ERISA Claim

Defendant advances two reasons why it should be granted summary judgment concerning Plaintiff's claim under ERISA. Defendant contends that (1) American Fidelity, and not OG&E, is the fiduciary over the disability program adopted for OG&E employees, and therefore OG&E cannot be sued under ERISA with regard to the decision to

terminate Plaintiff's long-term disability benefits; and (2) Plaintiff cannot pursue a claim under ERISA because he failed to exhaust administrative remedies.

In the third ground of Plaintiff's Complaint, Plaintiff alleges a violation of 29 U.S.C. §1140, a provision of ERISA which makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of [title 29 U.S.C.], or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. §301 et seq.], or for the purpose of interfering with the attainment of any right which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act." 29 U.S.C. §1140. In support of this claim, Plaintiff alleges in the Complaint that he "suffered permanent partial disability" as a result of a job-related injury, that because of his disability he "qualified for Defendant's short-term and long-term disability insurance plan and certain other employee benefit plans," that Defendant "initially extended such benefits to Plaintiff, but intentionally failed to advise Plaintiff concerning Plaintiff's right to return to work," and when Plaintiff demanded to return to work "Defendant continued to misrepresent certain conditions so as to have Plaintiff believe that there was no position for which Plaintiff could perform," that "Defendant possessed a substantial economic motive to terminate him and so acted in order to deny Plaintiff certain employee benefit plans." Complaint, at 3.

Appendix B

In order to be entitled to relief under 29 U.S.C. §1140, Plaintiff "is required to prove, by a preponderance of the evidence, that his discharge was motivated by an intent to interfere with employee benefits protected by ERISA." *Phelps v. Fields Real Estate Co.*, 991 F.2d 645, 649 (10th Cir. 1993). Plaintiff's convoluted allegations and evidentiary documents presented with regard to his ERISA claim provide no direct evidence of discriminatory intent. He must, at the very least, then, "introduce evidence that suggests interference with ERISA rights was a motivating factor" in his termination. *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1223-1224 (11th Cir. 1993).

There is no dispute that OG&E's employee disability plan is governed by ERISA. *See* 29 U.S.C. §1003. However, it is not employee disability benefits that Plaintiff contends were denied through unlawful interference. Rather, in Plaintiff's Response to Defendant's dispositive Motion, Plaintiff clarifies his ERISA claim. Plaintiff contends that "OG&E had a duty to process Plaintiff's claim for worker's compensation, yet OG&E fraudulently misrepresented to American Fidelity that the injury did not result from Plaintiff's employment." Plaintiff's Response, at 13-14.

In support of his claim of misrepresentation, Plaintiff refers to a form that American Fidelity sent to OG&E and that was completed by OG&E's human resources administrator on March 6, 1998, in which the administrator responded "no" in response to the inquiry whether Plaintiff's disability resulted from his employment. Plaintiff's Response, Ex. 5. However, Plaintiff stated in his deposition that he wasn't sure whether the back injury that resulted in

his 1985 back surgery was caused by his employment, and also stated that he did not file a workers' compensation claim for his 1997 neck surgery because he "didn't want to make waves." Defendant's Reply, Ex. B, at 16, 18. He further stated in deposition testimony that no one ever told him not to file a workers' compensation claim and that he never even asked about filing such a claim. *Id.* at 18, 27. Plaintiff provides no support for his allegation that OG&E had a "duty" to file a workers' compensation claim for Plaintiff. The only duty prescribed by Oklahoma law upon employers is the duty to post a notice advising employees that they are covered by the Workers' Compensation Act and that workers' compensation counseling services are available at the Workers' Compensation Court. Okla. Stat. tit. 85, §43 (1991). Plaintiff does not allege lack of such notice. Rather, Plaintiff's deposition testimony reflects his knowledgeable choice not to seek workers' compensation benefits. Viewing the evidence in the light most favorable to Plaintiff, there is no material issue of fact as to whether OG&E interfered with Plaintiff's right to workers' compensation benefits, and Defendant is entitled to summary judgment on this claim.

Assuming that Plaintiff is also asserting an ERISA claim under 29 U.S.C. § 1140 based on the termination of his disability benefits, it is not disputed that Plaintiff applied for and received short-term disability benefits for two years, and that the disability program adopted by OG&E was administered by OG&E's disability carrier, American Fidelity. It is not disputed that Plaintiff's request for long-term disability benefits was denied by American Fidelity. *See* Defendant's Motion, Ex. D, at 27. In a letter to Plaintiff dated April 21, 1999, Plaintiff was advised by

American Fidelity that his disability benefits would cease after August 29, 1999. *Id.*, at 27.

It is further not disputed that after August 25, 1997, Plaintiff was never medically released to return to the full duties of his position at OG&E. Curiously, although Plaintiff alleges in his Response to Defendant's Motion brief that OG&E misrepresented to American Fidelity that Plaintiff was eligible for disability benefits, Plaintiff inconsistently alleges in his Complaint that he qualified for the disability benefits provided by American Fidelity. Regardless of which allegation is the one Plaintiff wishes to rely on, Plaintiff has presented no evidence to support his bare conclusion of a "misrepreseniation" by OG&E with regard to Plaintiff's eligibility for disability benefits. OG&E provides uncontroverted evidence that the disability program was wholly administered by American Fidelity and that the decision to allow and to terminate Plaintiff's disability benefits was wholly within the discretionary authority of American Fidelity.

Plaintiff testified in his deposition that he understood that his May 24, 1999 request for reinstatement to his previous job was denied "[b]ecause there was no light duty that I could perform" and because his doctors had not released him for the full duties of his previous job. Defendant's Motion, Ex. B, at 5-6. Plaintiff conceded in his deposition that he never applied for any other job at OG&E. *Id.*, at 101. The undisputed evidence shows Plaintiff was terminated after American Fidelity determined that Plaintiff was no longer entitled to receive disability benefits. Accordingly, there is no material issue of fact as to whether OG&E unlawfully

interfered with Plaintiff's disability benefits, and OG&E is entitled to summary judgment on this claim.[4]

III. State Law Tort Claim for Negligent or Intentional Infliction of Emotional Distress

Defendant seeks summary judgment concerning Plaintiff's pendent state law claim for damages for negligent or intentional infliction of emotional distress, contending that the claim is either preempted by ERISA or the Oklahoma Workers' Compensation Act, or that Plaintiff has not stated sufficient facts to allege a claim of intentional or negligent infliction of emotional distress.

In his Complaint, Plaintiff alleges that Defendant's "wrongful and intentional conduct . . . in harassing Plaintiff and in subjecting Plaintiff to disparate treatment" because of his age, including "represent[ing] to Plaintiff that he was still being carried as an employee of the Defendant due to his on the job injury, when in fact the Defendant had terminated" Plaintiff, has caused Plaintiff to suffer mental and emotional stress. However, in response to Defendant's dispositive Motion, Plaintiff makes different allegations in support of his claim of negligent or intentional infliction of emotional distress. These new allegations relate solely to the work-related "order[ ]" from Plaintiff's supervisor,

4. It is not necessary to determine whether or not OG&E is a fiduciary of the long-term disability benefit program adopted by OG&E for its employees or whether or not Plaintiff exhausted administrative remedies. Plaintiff does not seek benefits under the program, but alleges OG&E interfered with his right to receive those benefits under 29 U.S.C. §1140.

Singleton, to drive the 75-ton road crane in August 1997. Plaintiff contends that this work assignment was so "tempered with evil intent" that it "intentionally placed the life of Plaintiff in grave and unnecessary jeopardy." Plaintiff's Response, at 18.

In *Eddy v. Brown*, 715 P.2d 74 (Okla. 1996), the Oklahoma Supreme Court reaffirmed that the state recognizes the tort of intentional infliction of emotional distress and that the tort "is governed by the narrow standards of §46 Restatement of Torts (Second) [1997]." *Id.* at 76. The Restatement establishes that " '[o]ne who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.' " *Id.* (quoting §46 Restatement of Torts (Second)). In analyzing a tort claim under this standard, "[i]t is the trial court's responsibility initially to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the §46 standards. Only when it is found that reasonable [persons] would differ in an assessment of this critical issue may the tort-of-outrage claim be submitted to a jury. . . . Conduct which, though unreasonable, is neither 'beyond all possible bounds of decency' in the setting in which it occurred, nor is one that can be 'regarded as utterly intolerable in a civilized community,' falls short of having actionable quality." *Id.*, at 76-77 (footnote omitted).

Preliminarily, Plaintiff describes intentional conduct by his supervisor but the heading given to this particular argument identifies his claim as being one for "intentional

or negligent infliction of mental and/or emotional distress." Plaintiff Complaint, at 2. In Oklahoma, "accidental injuries arising out of and in the course of employment" which are "reasonably connected with the conditions of employment" are compensable solely through the Oklahoma Workers' Compensation Act. Okla. Stat. tit. 95, §3(7) (1991). Defendant asserts in its Reply that Plaintiff's claim for negligent injury resulting from driving the road crane is barred by the Oklahoma Workers' Compensation Act.

"An on-the-job injury 'arises out of employment only if (1) a causal connection exists between the conditions under which the work was required to be performed and the resulting injury, and (2) the injury resulted from a risk reasonably incident to the employment." *Decker v. Oklahoma State University*, 766 P.2d 1371, 1374-1375 (Okla. 1988). Plaintiff clearly alleges that his injuries were caused by the conditions under which he was required to work, and the risk of a neck injury in Plaintiff's heavy equipment operator position is certainly "reasonably incident to the employment." Consequently, Plaintiff's sole remedy for negligent injury under the facts alleged by Plaintiff is the Oklahoma Workers' Compensation Act. *See Oklahoma City v. Schoonover*, 535 P.2d 688, 691 (Okla. 1975) (emotional stress engendered by working conditions and nature of employment and accompanied by accidental injury is compensable under workers' compensation program).

Plaintiff avers in his responsive affidavit that when Singleton ordered him to drive the 75-ton road crane, he "begged John Singleton to not make me drive the 75-ton road crane back from Ardmore, and in doing so,

I reemphasized that due to my back and neck injuries that I did not believe I could handle the assignment." Plaintiff's Response, Ex. 1, at 3.

Plaintiff's affidavit statements vary considerably from his deposition testimony concerning this incident. In his deposition, Plaintiff stated that he

> told John that I didn't think I should be in it, that I knew how to run it. And he said, "You need the experience and you're going to drive it." And I said, "I know how to drive it." He said, "You're being paid top pay to do everything. You will drive it back from Ardmore."

Defendant's Reply, Ex. B, at 42. Plaintiff also stated in his deposition that driving cranes was part of the job for all of the employees in the heavy hauling division at OG&E, and that his treating physician had placed no restrictions on his ability to work following his March 1997 neck surgery, even though his physician was aware of the requirements of his position, including driving and operating cranes. *Id.*, at 42-44. Other OG&E employees in the heavy hauling division have testified that driving cranes, including the 75-ton road crane, is a normal part of the job. Defendant's Supplemental Exhibits E, F.

In Plaintiff's deposition, he did not testify that he alerted his supervisor to any physical-related difficulty with driving the road crane. His deposition testimony concerning his supervisor's statements certainly do not reflect "evil intent" to cause Plaintiff physical harm. Rather, the supervisor's

remarks indicate the supervisor ordered Plaintiff to drive the crane for two solely job-related reasons: (1) Plaintiff needed experience in driving the crane, and (2) Plaintiff was being paid the higher salary of a heavy equipment operator, and thus he was expected to drive all of the heavy equipment when needed. Reasonable persons would not differ in their assessment of the Plaintiff's deposition testimony, and there is no material disputed fact regarding the claim of intentional infliction of emotional distress asserted by Plaintiff. Reasonable persons would not find that the action of Plaintiff's supervisor in ordering him to drive the road crane on August 21, 1997, was so extreme or outrageous as to subject Defendant to liability for intentional infliction of emotional distress under the standard employed in Oklahoma for such a claim. Thus, Defendant is entitled to summary judgment on this claim.

V. Claim for Retaliation

Plaintiff's final claim asserted in the Complaint is a claim for retaliation for protected activity under 29 U.S.C. §623(d) of the ADEA. Plaintiff alleges that following his deposition testimony in Riffel's age discrimination suit, Plaintiff experienced different treatment, including intensified harassment, intentional infliction of emotional distress, and termination. Defendant moves for summary judgment on this claim.

In his Response to the motion, Plaintiff alleges that within two months of his deposition against OG&E in Riffel's age discrimination case, Plaintiff suffered these specific reprisals: he was denied a light duty assignment, he

was denied an air-ride-suspension truck, his health was jeopardized by requiring him to drive the 75-ton road crane, he was denied the right to file a workers' compensation claim regarding the injury that occurred on August 21, 1997, he was denied the right to work for two weeks in a light duty assignment, and in his Complaint he alleges that his termination was in retaliation for the deposition testimony.

The ADEA makes it unlawful to retaliate against an employee for engaging in certain protected activities, including testifying, assisting, or participating in any manner in litigation under the ADEA. 29 U.S.C. §623(d). The familiar McDonnell Douglas burden-shifting analysis is generally employed in reviewing an ADEA retaliation claim. *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634 (10th Cir. 1998). Under this approach, the plaintiff must first establish a *prima facie* case of retaliation by showing "(1) protected opposition to discrimination or participation in a proceeding arising out of discrimination; (2) adverse action by the employer contemporaneously or subsequent to the employee's protected activity; and (3) a causal connection between such activity and the employer's action." *Id.* If the plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant who must articulate a legitimate, nondiscriminatory reason for the adverse action. *Id.* "Once the defendant has dispelled the inference of retaliation by establishing a legitimate reason, 'the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination.' " *Id.* (quoting *Burrus v. United Telephone Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir., *cert. denied*, 459 U.S. 1071 (1982)).

Appendix B

The undisputed facts reveal that on June 6, 1997, Plaintiff testified in a deposition on behalf of Riffel, who had sued OG&E in this Court under the ADEA. Defendant's Reply, Ex. A. On July 31, 1997, United States District Judge Wayne E. Alley entered summary judgment in favor of OG&E in the *Riffel* case. Defendant's Motion, Ex. H. No mention was made of Plaintiff's deposition in this order. The order of the Tenth Circuit Court of Appeals in Riffel's appeal of the summary judgment was entered on March 31, 1998. In the Tenth Circuit's order, the appellate court mentioned for the first time the deposition of Plaintiff on behalf of Riffel. The appellate court concluded that this testimony constituted some direct evidence of age discrimination against Riffel and reversed Judge Alley's entry of summary judgment. Any actionable retaliation of Plaintiff under the ADEA could not have occurred prior to June 6, 1997, as that was the date on which Plaintiff was deposed in the *Riffel* matter.[5] Defendant does not question whether or not the deposition involved protected activity, and the evidence is indisputable that the Plaintiff's deposition testimony was protected activity within the meaning of 29 U.S.C. §623(d).

Plaintiff identifies several allegedly adverse employment actions. However, Plaintiff does not specifically allege who denied him a "light duty assignment" or when this action occurred. It is not disputed that other members of Plaintiff's heavy equipment operator work group had previously been temporarily placed on light duty following various injuries. However, there is no evidence *all* employees in Plaintiff's

5. Although Plaintiff alleges in his responsive brief that he was listed as a witness in *Riffel* in October 1996, Plaintiff does not allege with particularity that this listing caused any retaliatory actions.

work group received "light duty" assignments following injuries. Plaintiff returned to work following neck surgery in April 1997. Plaintiff testified in his deposition that he was placed on light duty for two days when he returned from neck surgery. Defendant's Motion, Ex. A, at 27. Plaintiff testified he had previously been placed on light duty after back surgery and foot surgery, and the light duty assignment following his back surgery lasted for "maybe a month." Defendant's Motion, Ex. B, at 94, 96. Plaintiff testified that another co-worker, Rick Brakebill, was given a light duty assignment for "probably a week" following an injury, that another co-worker, Ray Pierce, was given light duty for "a couple of weeks" following his injury, that Tom Howard was given light duty for "a couple of weeks" after an injury, and that Don Riffel was given light duty for "a little over a month" after an injury. Defendant's Motion, Ex. B, at 81-84, 93. Plaintiff's return to work preceded his deposition testimony by two months, and Plaintiff did not report any work-related injury until August 25, 1997, four months after he returned to work. Plaintiff testified that his physician had placed no restriction on his ability to perform his usual heavy equipment position following the March 1997 neck surgery. Defendant's Motion, Ex. A, at 20-21.

No retaliatory inference can be gleaned from Plaintiff's allegation concerning the "denial of a light duty assignment" given Plaintiff's own deposition testimony reflecting the absence of medical restrictions placed on Plaintiff and the discretionary nature and short length of "light duty" assignments given other co-workers.

Plaintiff next alleges that the "denial of air-ride-suspension truck" supports his retaliation claim. Plaintiff

avers in his responsive affidavit that Tom Howard and "Breakbill" are assigned to trucks equipped with air-ride-suspension. However, again, Plaintiff makes no specific allegations as to when the "denial" occurred or who participated this alleged adverse action. Plaintiff also does not allege that such an accommodation was given to other co-workers as a result of an injury. In Plaintiff's deposition testimony, he stated that no work restrictions were placed on him by his treating physician after his March 1997 neck surgery. There is substantial evidence that operating heavy equipment such as cranes was a normal part of Plaintiff's job as well as the jobs of other OG&E employees having the same position as the Plaintiff. Under these circumstances, no inference of retaliation is shown by Plaintiff's allegation of a "denial of air-ride-suspension truck."

Plaintiff next alleges that retaliation is shown by Singleton's order to Plaintiff to drive the 75-ton road crane. Plaintiff's deposition testimony, discussed hereinabove, concerning the reasons given by Singleton for the directive to drive the crane, does not create any inference of retaliation. Plaintiff testified that driving cranes was a normal part of his job and all of the employees in his division were expected to "fill [ ] in" for the two regular crane operators when necessary and that he had previously driven this particular road crane with no physical repercussions. Moreover, summary judgment had been granted in OG&E's favor immediately prior to this work directive, and Plaintiff does not present any facts from which it can be inferred that Singleton was even aware of Plaintiff's deposition testimony. *See Shinwari v. Raytheon Aircraft Co.*, No. 98-3324, 2000 WL 731782, *7 (10th Cir. June 8, 2000) ("protected activity

cannot bear a causal relationship to adverse action if those taking the action were unaware of the existence of the protected activity").

Plaintiff's allegation that he was "denied the right to file a workers' compensation claim" contradicts his deposition testimony, and therefore this allegation does not create an issue of fact. Plaintiff's deposition testimony, in which he stated he had never inquired into or been denied the right to file a workers' compensation claim, creates no inference of retaliation.

Plaintiff next alleges that he was denied the right to work for two weeks in a light duty assignment following the August 21, 1997 injury. Plaintiff points to his doctor's statement dated August 26, 1997, that Plaintiff was restricted to light duty work for two weeks. Plaintiff's Response, Ex. 7, at 2, Plaintiff avers in his responsive affidavit that he took this doctor's note to Singleton, Singleton discussed the note with *his* supervisor, Mr. Newton, Singleton then advised Plaintiff that OG&E would accept the doctor's restriction and place Plaintiff on light duty, and because "he did not have any light duty for me" Plaintiff was sent home that day. Plaintiff's Response, Ex. 1, at 4. Although Plaintiff testified in his deposition that some co-workers had been placed on light duty assignments following injuries, his deposition testimony clearly showed that such assignments were extended to some employees for short periods of time within the discretion of the supervisor of the heavy equipment division. Plaintiff's testimony and affidavit reflect that at most he may have had a subjective expectation that he would be placed on light duty. There is no evidence sufficient to

create any inference of a causal connection between the alleged adverse employment action of not placing Plaintiff on light duty following his August 21, 1997 injury and his deposition testimony in the *Riffel* case. Again, Plaintiff does not allege that Singleton was aware of the deposition testimony, and none of Singleton's statements, as testified to by Plaintiff, indicate Singleton's awareness of Plaintiff's assistance in *Riffel*.

Plaintiff alleges in his Complaint that his termination also supports his claim of retaliation under the ADEA. Plaintiff does not renew this allegation in response to Defendant's disposition Motion. In Plaintiff's deposition, Plaintiff testified that his request to be reinstated to his previous job was denied on or about May 24, 1999, because there was no work he could perform with his medical restrictions. Defendant's Motion, Ex. C, at 100; Defendant's Reply, Ex. B, at 5. Although Plaintiff testified there were jobs at OG&E that could have been performed with his medical restrictions, Plaintiff conceded that he had never applied for any other jobs at the company and did not know if any jobs were open at the time his request for reinstatement was denied. Defendant's Motion, Ex. C, at 101. Plaintiff also conceded that at that time he had not been released for "full duty" by his physician. *Id.* at 5-6. In fact, Plaintiff testified in his deposition that after he went on disability, his supervisor, Mr. Singleton, had telephoned him and "said they were looking for a position that I could do" with Plaintiff's medical restrictions, but Plaintiff never called him back. Defendant's Reply, Ex. B, at 102. The Tenth Circuit's decision in the *Riffel* matter was entered in May 1998, a year before Plaintiff's request for reinstatement was denied.

Appendix B

No discriminatory *animus* can be inferred from the adverse employment action. There is no evidence of statements or conduct indicating a causal connection between Plaintiff's request for reinstatement and the appellate court decision in *Riffel*. Accordingly, Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

Based on the foregoing reasons, Defendant's Motion for Summary Judgment (Doc. #26) is GRANTED. Judgment shall issue accordingly.

IT IS SO ORDERED this 17th day of July, 2000.

s/ Gary M. Purcell
GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE